

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

**GUIDELINES FOR TRIAL AND FINAL PRETRIAL CONFERENCE
IN CIVIL BENCH CASES
BEFORE THE HONORABLE WILLIAM ALSUP**

FINAL PRETRIAL CONFERENCE

1. Please do not prepare a joint pretrial conference statement. Nor should counsel invest time on deposition designations or extracts from interrogatories or requests for admissions at the pretrial conference stage. Instead, please file seven calendar days in advance of the final pretrial conference the following:

(a) In lieu of preparing a joint pretrial conference statement, the parties shall meet and confer and prepare a joint proposed final pretrial order, signed and vetted by all counsel, that contains: (i) a brief description of the substance of claims and defenses which remain to be decided, (ii) a statement of all relief sought, (iii) all stipulated facts, (iv) a list of all factual issues which remain to be tried, (v) a joint exhibit list in numerical order, including a brief description of the exhibit and Bates numbers, a column for when it is offered in evidence, a column for when it is received in evidence, and a column for any limitations on its use, and (vi) each party's separate witness list for its case-in-chief witnesses (including those appearing by deposition) providing, for

1 all such witnesses other than an individual plaintiff and an individual defendant, a
2 short statement of the substance of his/her testimony and, separately, what, if any,
3 non-cumulative testimony the witness will give. If non-cumulative testimony is
4 not spelled out, then the Court will presume the witness is cumulative. Time
5 limits will be set based on the non-cumulative descriptions. Items (v) and (vi)
6 should be appendices to the proposed order. The objective is to convert the
7 proposed order to a final order with the benefit of any discussion at the final
8 pretrial conference.

9 (b) Each side's proposed findings of fact and conclusions of law.

10 (c) Each side's trial brief.

11 (d) Any motion *in limine*, with the opposition, filed as follows: At
12 least twenty calendar days before the conference, serve, but do not file, the
13 moving papers. At least ten calendar days before the conference, serve the
14 oppositions. When the oppositions are received, the moving party should collate
15 the motion and the opposition together, back to back, and then file the paired sets
16 at least seven calendar days before the conference. Each motion should be
17 presented in a separate memo and numbered, as in, for example, "Plaintiff's
18 Motion in Limine No. 1 to Exclude" **PLEASE** be sure to three-hole punch
19 the chambers copies so they can go into a trial notebook. For bench trials,
20 motions *in limine* are rarely needed or useful.

21 2. The joint proposed final pretrial order and the proposed findings of fact and
22 conclusions of law shall be submitted on a 3-3/4-inch disk in WordPerfect 8.0 format, as well as
23 in hard copies. All hard-copy submissions should be three-hole punched on the left, so the
24 chambers' copy can be put in binders.

25 3. At the final pretrial conference, the above submissions shall be considered and
26 argued. The parties must take notes on rulings and submit a joint summary of all rulings in
27 proposed order format.
28

PRETRIAL ARRANGEMENTS

4. Should a daily transcript and/or real-time reporting be desired, the parties shall make arrangements with Robert Stuart, Supervisor of the Court Reporting Services, at (415) 522-2079, at least ten calendar days prior to the trial date. In all but the simplest fact cases, counsel should pre-arrange for an expedited transcript to facilitate prompt preparation of proposed findings *based on the trial record*. (Yes, this means that two rounds of proposed findings will be needed — one before the trial and one after the trial but with the benefit of the actual record.)

5. During trial, counsel may wish to use overhead projectors, laser-disk/computer graphics, poster blow-ups, models or specimens of devices. If monitor screens are used, there should be a single large screen (not multiple small screens) viewable by the Court, the witness and most counsel. It should be large and bright enough to be seen from a distance. If counsel cannot conveniently see the screen, then counsel may have a small monitor at counsel table. If both overhead projector and video equipment are to be used, then a single projection screen is best, thus requiring a projection-type video rather than a monitor. If video equipment is used, equipment capable of instantly accessing the relevant portions of transcripts and graphics should be used (rather than, for example, raw video tapes made at depositions which take time to forward or to rewind). Equipment should be shared by all counsel to the maximum extent possible. The Court provides no equipment other than an easel. The United States Marshal requires a court order to allow equipment into the courthouse. For electronic equipment, either know how to fix it or have a technician handy at all times. For overhead projectors, have a spare bulb. Tape extension cords to the carpet for safety. Please take down and store the equipment (in the courtroom) at the end of each court day. Please work with Dawn Toland (415-522-2020) on courtroom-layout issues.

SCHEDULING

6. In order to accommodate as many trials as possible, the Court will allow one trial in the morning and another trial in the afternoon. The normal trial schedule will be 8:00 a.m. to 1:00 p.m. (or slightly longer to finish a witness) with two fifteen-minute breaks and ending

before lunch. Counsel must arrive by 7:45 a.m., or earlier as needed, for any matters to be heard before the evidence begins. If an afternoon trial schedule is scheduled, it will run from 2:00 p.m. to 6:00 p.m. (or slightly longer) with two fifteen-minute breaks. The trial week is Monday through Friday except for any Thursday morning and Tuesday afternoon and all federal court holidays.

OPENING STATEMENTS

7. If openings are permitted, each side will have a predetermined time limit for its opening statement. Counsel must cooperate and meet and confer to exchange any visuals, graphics or exhibits to be used in the opening statements, allowing for time to work out objections and any reasonable revisions.

WITNESSES

8. Throughout the trial, all counsel are entitled to know a firm order of witnesses for the next two full court days and the exhibits that will be used on direct examination (other than for impeachment of an adverse witness). Within 24 hours of such notice, all other counsel shall provide any objections to such exhibits and shall provide a list of all further exhibits to be used with the same witness on cross-examination (other than for impeachment, which ordinarily is limited to statements signed by or adopted by the witness). This requires that the first such notice be provided before trial actually begins. All such notices should be provided in writing. If reference is made to an unnoticed document or thing by a witness during an examination (even if not offered in evidence), then in any follow-up examination by other adverse parties, the unnoticed document or thing may be used to the same extent as if it had been noticed, subject to substantive objections.

9. Always have your next witness ready and in the courthouse. Failure to have the next witness ready or to be prepared to proceed with the evidence will usually constitute resting. If counsel plans to read in a transcript of a deposition anyway, it is advisable to have a deposition prepared and vetted early on to read just in case.

10. A witness or exhibit not listed in the joint pretrial statement may not be used without good cause. This rule does not apply to true rebuttal witnesses (other than rebuttal

experts who must be listed). Defense witnesses are normally case-in-chief witnesses, not “rebuttal” witnesses.

11. When there are multiple parties, counsel are responsible for coordination of the cross-examination to avoid duplication.

12. Stand at or near the podium to ask questions, straying only to point out material on charts or overheads. Please request permission to approach the witness or the bench.

13. On the first day of trial, be sure to bring the original and clean copies of any deposition(s) for which you are responsible. Any corrections must be readily available. If you are likely to need to use the deposition during a witness examination, then give the Court and the witness a copy with any corrections at the outset of the examination.

14. In lieu of direct testimony, the Court will consider receiving “prepared direct” testimony in the form of declarations. When the witness is presented, the proponent must verbally summarize the direct. Live cross-examination and redirect shall then occur.

EXPERTS

15. A recurring problem in trials is the problem of expert witnesses trying to go beyond the scope of their expert reports on direct examination. FRCP 26(a)(2) and FRCP 37(c) limit experts to the opinions and bases contained in their timely reports (absent substantial justification or harmlessness). The Court regularly enforces these rules. FRCP 26(a) even requires that any “exhibits to be used as a summary of or support for the opinions” be included in the report. Accordingly, at trial, the direct testimony of experts will be limited to the matters disclosed in their reports. Omitted material may not ordinarily be added on direct examination. This means the reports must be complete and sufficiently detailed. Illustrative animations, diagrams, charts and models may be used on direct examination only if they were part of the expert’s report, with the exception of simple drawings and tabulations that plainly illustrate what is already in the report, which can be drawn by the witness at trial or otherwise shown to the jury. If cross-examination fairly opens the door, however, an expert may go beyond the written report on cross-examination and/or re-direct examination. By written stipulation, of course, all sides may relax these requirements.

1 16. As to damages studies, the cut-off date for *past damages* will be as of the expert
2 report (or such earlier date as the expert may select). In addition, the experts may try to project
3 *future damages* (i.e., after the cut-off date) if the substantive standards for future damages can be
4 met. With timely leave of Court or by written stipulation, the experts may update their reports
5 (with supplemental reports) to a date closer to the time of trial.

6 17. The case management order will already have set out the timetable for expert
7 reports.

8 **USE OF DEPOSITIONS TO IMPEACH AND SHORT READ-INS**

9 18. Depositions can be used at trial to impeach a witness testifying at trial or, in the
10 case of a party deponent, “for any purpose.” Please follow the following procedure:

11 (a) On the first day of trial, be sure to bring the original and clean
12 copies of any deposition(s) for which you are responsible. Any corrections must
13 be readily available. If you are likely to need to use the deposition during a
14 witness examination, then give the Court a copy with any corrections at the
15 outset of your examination. This will minimize delay between the original
16 question and the read-ins of the impeaching material. Opposing counsel should
17 have their copy immediately available.

18 (b) When you wish to read in a passage, simply say, for example:
19 “I wish to read in page 210, lines 1 to 10 from the witness’ deposition.” A brief
20 pause will be allowed for any objection.

21 (c) When reading in the passage, state “question” and then read the
22 question exactly. Then state “answer” and then read the answer exactly. Stating
23 “question” and “answer” is necessary so the jury and the court reporter can
24 follow who was talking at the deposition.

25 (d) The first time a deposition is read, state the deponent’s name, the
26 date of the deposition, the name of the lawyer asking the question, and if it was
27 FRCP 30(b)(6) deposition, please say so. The first time a deposition is read, the
28

1 Court will give an appropriate explanation to the jury about depositions. Please
2 do not embellish on this with follow-on questions.

3 (e) Please do **NOT** ask, “Didn’t you say XYZ in your deposition?”
4 The problem with such a question is that the “XYZ” rarely turns out to be
5 exactly what the deponent said and is just the lawyer’s spin on what was said.
6 Instead, ask for permission to read in a passage, as above, and read it in exactly,
7 without spin, so that the jury can hear what was actually testified to.

8 (f) Subject to Rule 403, party depositions may be read in whether or
9 not they contradict (and regardless of who the witness is on the stand). For
10 example, a short party deposition excerpt may be used as foundation for
11 questions for a different witness on the stand.

12 (g) Rather than reading the passage, counsel are free to play an
13 audiovisual digitized version of the passage but counsel must have a system for
14 immediate display of the precise passage.

15 **DEPOSITION DESIGNATION**

16 19. The following procedure applies only to witnesses who appear by deposition. It
17 does not apply to live witnesses whose depositions are read in while they are on the stand. To
18 save time and avoid unnecessary work, it is not necessary to make all deposition designations
19 before trial. Instead, the following steps should be followed.

20 (a) To designate deposition testimony, photocopy the cover page, the
21 page where the witness is sworn, and then each page from which any testimony
22 is proffered. Line through or x-out any portions of such pages not proffered.
23 Also, line through objections or colloquy unless they are needed to understand
24 the question. Please make sure any corrections are interlineated and that
25 references to exhibit numbers are conformed to the trial numbers. Such
26 interlineations should be done by hand. The finished packet should then be the
27 actual script and should smoothly present the identification and swearing of the
28 witness and testimony desired. The packet should be provided to all other

1 parties at least five calendar days before it will be used in court. For the rare
2 case of voluminous designations, more lead time will be required. Please be
3 reasonable.

4 (b) All other parties must then promptly review the packet and
5 highlight in yellow any passages objected to and write in the margin the legal
6 basis for the objections. If any completeness objection is made, the objecting
7 party must insert into the packet the additional passages as needed to cure the
8 completeness objection. A completeness objection should normally be made
9 only if a few extra lines will cure the problem. Such additions shall be
10 highlighted in blue and an explanation for the inclusion shall be legibly
11 handwritten in the margin. Please line out or x-out any irrelevant portions of the
12 additional pages.

13 (c) The packets, as adjusted, must then be returned to the proffering
14 party, who must then decide the extent to which to accept the adjustments. The
15 parties must meet and confer as reasonable. Counsel for the proffering party
16 must collate and assemble a final packet that covers the proffer and all remaining
17 issues. At least two calendar days before the proffer will be used, the proponent
18 must provide the Court with the final packet, with any objected-to portions
19 highlighted and annotated as described above. If exhibits are needed to resolve
20 the objections, include copies and highlight and tag the relevant passages. Alert
21 the Court on the record that the packet is being provided and whether any rulings
22 are needed. *Tag all passages that require a ruling.* The Court will then read the
23 packet and indicate its rulings in the margin in a distinctive manner. Ordinarily,
24 argument will not be needed.

25 (d) Counter designations must be made by providing a packet with
26 the counter-designated passages to the proponent at the same time any objections
27 to the original proffer are returned to the first proffering party, who must then
28 supply its objections in the same manner.

1 (e) When the packet is read in court, the examiner reads the questions
2 (and any relevant colloquy) from the lectern and a colleague sits in the witness
3 stand and reads the answers. When a video-taped deposition is to be played
4 instead, the packets must still be prepared, as above, in order to facilitate rulings
5 on objections. The video should omit any dead time, long pauses, and
6 objections/colloquy not necessary to understand the answers. The Court may
7 decide, instead, to take the designations under submission and simply read them.

8 **REQUESTS FOR ADMISSIONS AND INTERROGATORIES**

9 20. Please designate responses to requests for admissions and interrogatory answers
10 in the same manner and under the same timetable as depositions.

11 **EXHIBITS**

12 21. Prior to the final pretrial conference, counsel must meet and confer in person
13 over all exhibit numbers and objections and to weed out duplicate exhibits and confusion over
14 the precise exhibit. Please be reasonable.

15 22. Use numbers only, not letters, for exhibits, preferably the same numbers as were
16 used in depositions. Blocks of numbers should be assigned to fit the need of the case
17 (*e.g.*, Plaintiff has 1 to 100, Defendant A has 101 to 200, Defendant B has 201 to 300, etc.).
18 A single exhibit should be marked only once, just as it should have been marked only once in
19 discovery (if this Court's guidelines were followed). If the plaintiff has marked an exhibit, then
20 the defendant should not re-mark the exact document with another number. Different *versions*
21 of the same document, *e.g.*, a copy with additional handwriting, must be treated as different
22 exhibits with different numbers. To avoid any party claiming "ownership" of an exhibit, all
23 exhibits shall be marked and referred to as "Trial Exhibit No. _____," not as "Plaintiff's
24 Exhibit" or "Defendant's Exhibit." If an exhibit number differs from that used in a deposition
25 transcript, then the latter transcript must be conformed to the new trial number if and when the
26 deposition testimony is used (so as to avoid confusion over exhibit numbers). You cannot have
27 competing versions of the same exhibit number; such discrepancies must be brought to the
28 Court's attention promptly.

23. The exhibit tag shall be in the following form:

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA
TRIAL EXHIBIT 100
CASE NO. _____
DATE ENTERED _____
BY _____ DEPUTY CLERK

Counsel preferably will make the tag up in a color that will stand out (yet still allow for photocopying) but that is not essential. Place the tag on or near the lower right-hand corner or, if a photograph, on the back. Counsel should fill in the tag but leave the last two spaces blank. The parties must jointly prepare a *single* set of all trial exhibits that will be the official record set to be used with the witnesses and on appeal. Each exhibit must be tagged and in a separate folder (not in notebooks). Deposit the exhibits with the deputy clerk (Dawn Toland) on the first day of trial. The tags can be adhesive or stapled on.

24. Counsel must consult with each other and with the deputy clerk at the end of each trial day and compare notes as to which exhibits are in evidence and any limitations thereon. If there are any differences, counsel should bring them promptly to the Court's attention.

25. In addition to the official record exhibits, a *single, joint* set of bench binders containing a copy of the exhibits must be provided to the Court on the first day of trial. Each exhibit must be separated with a label divider (an exhibit tag is unnecessary for the bench set). In large letters, the labels should say the exhibit number on the binders. Please use 1-1/2-inch binders with locking rings. (Heavier binders are too hard to handle.)

26. At the close of evidence, counsel shall jointly provide a revised list of all exhibits actually in evidence (and no others) stating the exhibit number and a brief,

1 non-argumentative description (*e.g.*, letter from A. B. Case to D. E. Frank, dated August 17,
2 1999).

3 **OBJECTIONS**

4 27. Counsel shall stand when making objections. State the legal basis only. Please
5 speak up promptly.

6 28. There can only be one lawyer per witness per party for all purposes, including
7 objections.

8 **TIME LIMITS**

9 29. Ordinarily, the Court shall set fixed time limits at the final pretrial conference.
10 All of your examination time (whether direct, cross, re-direct or re-cross) for all witnesses must
11 fit within your time limit and you may allocate it as you wish. Opening and closing time limits
12 shall be separately considered. Counsel must keep track of everyone's usage. At the end of
13 each day, counsel must confer over the time used and the time remaining for all parties and
14 advise the Court daily. The Court will also try to keep track.

15 **SETTLEMENTS AND CONTINUANCES**

16 30. Shortly before trial or a final pretrial conference, counsel occasionally wish
17 jointly to advise the clerk that a settlement has been reached and seek to take the setting off
18 calendar but it turns out later that there was only a settlement "in principle" and disputes
19 remain. Cases, however, cannot be taken off calendar in this manner. Unless and until a
20 stipulated dismissal or judgment is filed or placed on the record, all parties must be prepared to
21 proceed with the final pretrial conference as scheduled and to proceed to trial on the trial date,
22 on pain of dismissal of the case for lack of prosecution or entry of default judgment. Only an
23 advance continuance expressly approved by the Court will release counsel and the parties from
24 their obligation to proceed. If counsel expect that a settlement will be final by the time of trial
25 or the final pretrial conference, they should notify the Court immediately in writing or, if it
26 occurs over the weekend before the trial or conference, by voice mail to the deputy courtroom
27 clerk. The Court will attempt to confer with counsel as promptly as circumstances permit to
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1 determine if a continuance will be in order. Pending such a conference, however, counsel must
2 prepare and make all filings and be prepared to proceed with the trial.

3 31. Please note that the case management order governs the schedule for expert
4 disclosures under Rule 26(a)(2). Pretrial disclosures under Rule 26(a)(3) (and initial disclosures
5 under Rule 26(a)(1)) shall be made as per the rule unless modified by the case management
6 order.

7
8 **IT IS SO ORDERED.**

9
10 Dated: September 14, 2004.

s/ WILLIAM ALSUP

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE